United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 21, 2006

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: United Food and Commercial
Workers Locals 135, 770, and 1442
(Albertson's, Inc.)
Cases 21-CC-3359, 21-CE-371

177-1642
560-2575-6713
560-2575-6721
560-7520-7500
560-7540-8040-3312
560-7540-8040-3350
584-2583-3300
584-3720
584-3740-5900

These cases were submitted for advice as to whether several local unions violated Section 8(e) and 8(b)(4) by: (1) pursuing grievances alleging alternate theories of contract violation against an employer that transferred two retail grocery stores to a wholly owned non-union subsidiary; and (2) holding a rally, including picketing, outside one of those stores the day before it was scheduled to close. We conclude that the issuance of a complaint is not warranted at this time, because the unions' grievances do not currently seek an unlawful contract interpretation and the unions' picketing was primary in nature.

FACTS

Albertson's, Inc. operates retail grocery stores in California and throughout the country. Albertson's is party to a multiemployer, multiunion collective-bargaining agreement between several large grocery store chains and United Food and Commercial Workers locals (the "Unions") in southern California.[1]

Article 1(A)(1) of the agreement provides that the employer must recognize the union as the exclusive bargaining representative of "all employees...who perform

[1] The employers are Albertson's; Ralph's Grocery Co.; and Von's, a Safeway Company. The unions are Food and Commercial Workers Locals 135, 324, 770, 1036, 1167, 1428, and 1442.

work within food markets...presently operated and hereafter established, owned or operated" by the employer within the local union's jurisdiction. Article 1(A)(2) of the agreement prohibits all subcontracting of bargaining unit work.[2] Article 17 of the agreement states that when a store is sold or transferred, the new owner must be notified of the agreement and must "make every effort to fill his employment needs" at the store with the former employees of the store but "shall not be required to retain in his employ any of the [seller or transferor's] employees."[3]

On September 22, 2004, Albertson's acquired Bristol Farms – a retail grocery chain with 11 stores in southern California – in a complex stock transaction. As a result of the transaction, Bristol Farms became an indirect wholly-owned subsidiary of Albertson's. Bristol Farms employees are not represented by any union. After the purchase, Bristol Farms continued to run its business unchanged given Bristol Farms' distinct market identity and unique niche as a high-end purveyor of fresh foods. Thus, Albertson's and Bristol Farms did not integrate operations or management.[4] Rather, Bristol Farms retained its separate management, its own employment standards and hiring practices, and brand identity. Bristol Farms declined Albertson's suggestion that it offer its foods at Albertson's stores and retained its own distribution facilities and delivery systems. Bristol Farms makes its own personnel decisions and maintains its own employee handbook, and there is no interchange of employees at any level between Albertson's and Bristol Farms. Bristol Farms' CEO continues to report to the Bristol Farms board of directors, which is separate from the Albertson's board of directors.

Although Bristol Farms and Albertson's maintained separate operations, they negotiated an administrative services agreement on October 25, 2004. Albertson's

---

[2] Article 1(A)(2) further provides that "leased departments" must be covered by the agreement, the employer must control leased-department employees' terms and conditions of employment, and leased-department employees must be part of the bargaining unit.

[3] The agreement also contains a no-strike clause and a grievance-arbitration provision.

[4] This was not typical. Albertson's historically has integrated the management and operations of purchased grocery chains.

offered Bristol Farms services including store development, legal and accounting services, payroll and benefit administration, procurement, and asset management.[5] Albertson's viewed its practices as superior or more cost effective than those of Bristol Farms, but Bristol Farms nonetheless rejected most in favor of its own existing practices. However, Bristol Farms has agreed to purchase research and market analyses from Albertson's.[6]

In March 2005,[7] Bristol Farms agreed to purchase two existing Albertson's stores – store no. 6161 in Westchester, California and store no. 6703 in La Jolla, California. Both stores were covered by the collective-bargaining agreement.

In June, Bristol Farms and Albertson's formally entered an asset acquisition agreement for the Westchester store. Specifically, Bristol Farms purchased the Albertson's lease of the facility along with certain fixed assets, including the liquor license, using its own financing.[8] On June 2, Albertson's formally advised the Unions in writing that the Westchester store would close effective July 7, but did not state who purchased the store. On June 7, the Unions responded to Albertson's announcement and requested to bargain over the store closure and the anticipated replacement of an Albertson's store with a Bristol Farms store.

The Unions met with Albertson's on June 24. According to Albertson's, the Unions demanded that the collective-bargaining agreement be extended to Bristol Farms once it took over the store. The Unions deny this. The Unions

---

[5] The agreement has been amended several times, most recently on July 27, 2005. The current administrative services agreement states that "it is expressly understood and agreed that at no time...will Albertson's provide Bristol [Farms] any services in relation to labor relations or employment matters, or human resources issues, except for clerical services for payroll administration...."

[6] Bristol Farms' Executive Vice President of Operations testified that this amounts to $500,000, which is less than 1/2 percent of Bristol Farms' total annual expenses for goods and services from third-party vendors.

[7] All dates are in 2005 unless otherwise indicated.

[8] Bristol Farms planned to begin demolishing and remodeling the store interior in July.

showed Albertson's drafts of documents the Unions planned to send to their members and the public, including one entitled "Albertson's Thinks You're Stupid" that stated that Albertson's planned to fire its Westchester store employees and replace them with "low-wage workers who have no benefits." The Unions concluded the meeting by stating that if Albertson's closed the Westchester store, the Unions would "turn up the heat" on their public relations machine.

On June 29, the Unions filed a formal written grievance over the closure of the Westchester store and its replacement with a Bristol Farms store. The grievance contained two alternative theories. The first theory alleged that Albertson's violated the collective-bargaining agreement by transferring the store to Bristol Farms because the store is "owned and operated by Albertson's" but its employees will not be included within the bargaining unit as required by Article 1(A)(1). The second, alternative, theory alleged that Albertson's violated the collective-bargaining agreement by transferring the store to Bristol Farms because it is "in essence subcontracting all of the bargaining unit work to Bristol Farms" in violation of Article 1(A)(2).

The Unions held a demonstration outside the Westchester store on July 7, the last day Albertson's was scheduled to operate it. According to photos and videos provided by Albertson's, the rally commenced at about 3:00 p.m. with the arrival of a large flatbed truck and a van carrying various Union officials. By 5:00 p.m., about 50 people picketed along the sidewalk on either side of the entrance to the store, chanting "Shame on Albertson's" and "Union yes, Bristol Farms no." The picket signs included language such as "Support Your UFCW Workers" and "Boycott Bristol Farms." After 30 minutes of picketing, the demonstrators and others congregated in the store parking lot around the flat-bed truck and listened to about 30 minutes of speeches. Next, the pickets made another round and distributed the "Albertson's Thinks You're Stupid" flyers.[9]

---

[9] According to Albertson's, some customers inside the store were escorted out by security guards followed by chants of "shame on you" by the picketers; several customers approaching the store asked Albertson's representatives if they were going to go through this again, referencing an earlier 4 ½ month labor dispute; and about five customers approached the store, but turned away when they saw the picketing. On August 1, Albertson's filed a grievance against the Unions, alleging that the picketing disrupted store business, impeded or prevented customers' entry and

Around this time, the Unions also began a public relations campaign against Albertson's. The Unions posted material on their websites and their newsletters; advertised in the local media; distributed petitions and flyers at Albertson's stores; and, according to Albertson's, sent flyers to homes in areas near Albertson's stores. All of the communications contained essentially the same message: that Albertson's was attempting to avoid its obligations under its contract with the Unions by closing stores, firing the employees, and then operating the reopened stores as non-Union facilities under the "Bristol Farms" name.

Bristol Farms and Albertson's formally entered an asset acquisition agreement for the La Jolla store. On August 4, Albertsons gave the Unions written notice of its plan to close the La Jolla store effective October 13. On August 5, the Unions filed a grievance over the planned closure of the La Jolla store and its replacement with a Bristol Farms store. The grievance alleged the same two theories of contract violation as the grievance regarding the Westchester store.

Albertson's and the Unions met on August 23 in an attempt to settle the grievances. Albertson's witnesses state that the Unions demanded that Albertson's recognize the Unions as the representative for the employees in the Westchester store acquired by Bristol Farms. The Unions deny that any demand for recognition was made.

A spate of correspondence followed the meeting. In summary, Bristol Farms accused the Unions of alleging that Bristol Farms and Albertson's were the same employer and demanding recognition at the Westchester store in order to settle the grievances. The Unions responded that the grievances were filed against Albertson's, not Bristol Farms, and denied that they had sought recognition from Bristol Farms at the Westchester store or any other store.

Bristol Farms has hired at least 75 percent of the staff for the Westchester store from other Bristol Farms locations. All but five of the Albertson's Westchester employees eventually transferred to other Albertson's stores. A Bristol Farms representative testified that he expected the Westchester store to reopen in March 2006. Albertson's has advised the Unions that the closure of the

---

exit, and created a public disturbance in violation of the work stoppage prohibitions in the agreement.

La Jolla store, originally scheduled for October, would be delayed.

Albertson's alleges in its position statement that the Unions' grievances regarding Article 1(A)(1) violate Section 8(b)(4)[10] and 8(e) because they are premised on an interpretation of the collective-bargaining agreement that violates 8(e).[11] Specifically, Albertson's argues that the Unions are unlawfully asserting in their grievances that it and Bristol Farms are the same employer.[12] Albertson's states, to the contrary, that Bristol Farms is a separate and independent company. Therefore, Albertson's asserts that the grievances have an unlawful object of forcing Bristol Farms – a neutral employer – to recognize the Unions and apply the collective-bargaining agreement to its employees, rather than to preserve bargaining-unit work. Albertson's further argues that the Unions' July 7 rally violated 8(b)(4) because the picketing was in furtherance of the same illegal object. However, Albertson's has stated that it is not alleging that the Unions' grievance theory regarding Article 1(A)(2), the no-subcontracting clause, violates the Act. Albertson's is confident that it will prevail before the arbitrator on that theory.

The Unions assert that their first grievance theory is dependent on a single employer finding and concede in their position statement that presently there is insufficient evidence that Albertson's and Bristol Farms are a single employer for them to prevail on that theory.[13] The Unions have stated that subpoenas returnable before the arbitrator

---

[10] The charge did not specify 8(b)(4)(A) or 8(b)(4)(B).

[11] Albertson's has not alleged that Article 1(A)(1) is facially unlawful. Thus, its 8(e) charge states: "Within the relevant 10(b) period, the...Unions have pursued an interpretation of their contract with...Albertson's which violates Section 8(e) of the Act." (Emphasis added.) In addition, Albertson's position statement alleges in several places that the grievances represent an unlawful interpretation of the contract, but does not assert that the provision is facially unlawful.

[12] Albertson's bases this assertion on statements made by the Unions and their attorney at various meetings and on the Unions' publicity campaign.

[13] The Unions have not formally withdrawn this portion of the grievances, nor have they advised Albertson's or the arbitrator that they are no longer pursuing it.

may adduce additional evidence on that point. The Unions assert, however, that the grievance theory alleging that Albertson's violated Article 1(A)(2) is lawful because it has a work preservation object. The Unions further contend that they do not seek to apply the collective-bargaining agreement to Bristol Farms employees. Rather, the Unions are demanding that Albertson's rescind its agreements to sell the Westchester and La Jolla stores to Bristol Farms; resume operation of the stores; reinstate unit employees who were transferred as a result of the store closures; and pay backpay for all unit employees who suffered any loss of employment opportunity. Finally, the Unions take the position that their July 7 picketing was in furtherance of primary work-preservation objectives.

The arbitration is scheduled for February 28, 2006.

ACTION

We conclude that the issuance of a Section 8(e) or 8(b)(4) complaint is not warranted at this time. The Unions' grievance theory based on Article 1(A)(1) of the contract is premised on the legal theory that Albertson's and Bristol Farms are a single employer and thus does not have an unlawful secondary object, provided the Unions do not depart from that position before the arbitrator. The grievance theory based on Article 1(A)(2) of the contract has a work-preservation object and is thus not secondary in nature. [*FOIA Exemption 5*

.] In addition, the Unions' picketing did not violate 8(b)(4), because the Unions had a primary labor dispute with Albertson's and the picketing took place at an Albertson's store. Accordingly, that 8(b)(4) charge allegation should be dismissed, absent withdrawal.

1. The Unions' Grievances Based on Article 1(A)(1) Do Not Violate Section 8(e) or 8(b)(4).

A union violates Section 8(b)(4)(ii)(A) and (B) if it construes and seeks enforcement of an otherwise lawful collective-bargaining agreement provision to accomplish an objective prohibited by Section 8(e).[14] Section 8(e) makes

[14] Sheet Metal Workers Local 27 (Thomas Roofing), 321 NLRB 540, 548 (1996). See also Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990); Service Employees Local 32B-32J (Nevins Realty Corp.), 313 NLRB 392, 392 (1993), enfd. in pertinent part 68 F.3d 490 (D.C. Cir. 1995); Teamsters Local 705

it an unfair labor practice for a labor organization and an employer "to enter into any contract or agreement, express or implied, whereby such employer...agrees to...cease doing business with any other person...." Section 8(e) does not prohibit agreements to preserve bargaining unit work for bargaining unit employees.[15] Rather, Section 8(e) prohibits only those agreements with a secondary purpose, i.e., agreements directed at a neutral employer or entered into for their effect on another employer. The relevant inquiry is whether, under all the surrounding circumstances, the agreement addresses the labor relations of the contracting employer regarding its own employees or is "tactically calculated to satisfy union objectives elsewhere."[16]

Companies that are bound only by common ownership generally are found to be neutrals with respect to each other's labor relations, but ostensibly separate entities that would constitute a "single employer" under the Act are not considered neutrals.[17] In determining single employer status, the Board and courts consider whether the entities are part of a single integrated enterprise, which may be indicated by the following factors: (1) common ownership; (2) common management; (3) centralized control of labor relations; and (4) interrelation of operations.[18] While no single factor is controlling,[19] the Board stresses the

---

(Emery Air Freight), 278 NLRB 1303, 1305 (1986), affd. in part and remanded in part 820 F.2d 448 (D.C. Cir. 1987).

[15] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 635 (1967).

[16] Id., at 644-645. See also Retail Clerks Local 1288 (Nickel's Pay-Less Stores), 163 NLRB 817, 819 (1967) ("provisions are secondary and unlawful if they have as their principal objective the regulation of the labor policies of other employers and not the protection of the unit"), enfd. in pertinent part 390 F.2d 858, 861-862 (D.C. Cir. 1968).

[17] Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 771 (1989), enfd. in part 905 F.2d 417 (D.C. Cir. 1990).

[18] See, e.g., Radio Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965); Emsing's Supermarket, 284 NLRB 302, 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

[19] See, e.g., Central Mack Sales, 273 NLRB 1268, 1271-72 (1984); Blumenfeld Theatres Circuit, 240 NLRB 206, 215 (1979), enfd. mem. 626 F.2d 865 (9th Cir. 1980).

latter three factors, and places particular emphasis upon centralized control of labor relations.[20] As the Board has stated: "the fundamental inquiry is whether there exists overall control of critical matters at the policy level."[21] The Board regards separate corporate subsidiaries and even unincorporated divisions of a corporation as separate persons under the Act if neither the parent nor the subsidiary "exercises actual or active, as opposed to merely potential, control over the day-to-day operations or labor relations of the other."[22]

In Long Elevator, the Board found that a union violates Section 8(b)(4) by pursuing a grievance seeking an unlawful 8(e) interpretation of a contract clause.[23] There, the respondent union filed a grievance on behalf of an employee who was disciplined for refusing to work behind a lawfully erected reserve gate. The union sought a construction of the no-strike clause that would require the primary employer to acquiesce in any work stoppage by its employees in support of the union's dispute with a neutral employer. The Board found that, so interpreted, the clause would constitute a de facto hot cargo provision in violation of Section 8(b)(4). "Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the presentation of the grievance coercive, notwithstanding the Supreme Court's decision in Bill Johnson's Restaurants v. NLRB...."[24]

The Unions' first grievance theory does not have the unlawful object of interpreting Article 1(A)(1) to be a de facto hot cargo provision. Thus, the grievances specifically state that Albertson's transfer of the two stores to Bristol Farms violated Article 1(A)(1) because the stores remain "owned and operated by Albertson's" and the employees are not part of the bargaining unit, as that provision requires. (Emphasis added.) Contrary to

---

[20] See, e.g., Geo. V. Hamilton, Inc., 289 NLRB 1335, 1337 (1988); Fedco Freightlines, 273 NLRB 399, 401 n.1 (1984).

[21] Emsing's Supermarket, 284 NLRB at 302.

[22] Los Angeles Newspaper Guild Local 69 (Hearst Corp.), 185 NLRB 303, 304 (1970).

[23] Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 & n.2 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990).

[24] Elevator Constructors (Long Elevator), 289 NLRB at 1095.

Albertson's assertions, the grievances, by their express language, do not seek to require Bristol Farms to join the multiemployer unit based on ownership alone. Further, the Unions have conceded that their grievances over Article 1(A)(1) will not succeed unless they can produce evidence at the arbitration hearing demonstrating single employer status. If anything, the Unions' grievance theory gives Article 1(A)(1) a decidedly lawful interpretation. While we agree with Albertson's that, under the evidence before us, it is not a single employer with Bristol Farms,[25] this does not imbue the Unions' grievance theory with an unlawful object.[26]

Moreover, it is well settled that a union does not commit an unfair labor practice by filing a grievance or attempting to enforce an arbitral award unless the grievance has an unlawful object or lacks a reasonable basis in fact or law. For example, in Ida Cal,[27] the Board found that a union did not violate Section 8(b)(4)(ii)(A) by filing a Section 301 lawsuit claiming that certain owner-operators were covered by a collective-bargaining agreement, even though the Board ultimately decided the owner-operators were independent contractors. Applying similar reasoning, the Board in Warwick Caterers[28] found no 8(b)(1)(A) violation when a union sought to use a grievance to apply a contract to employees the Board ultimately found the union did not represent. Absent a prior contrary determination by the Board, it was not unreasonable for the union to maintain its position on single employer status and accretion in its attempt to have an arbitrator resolve the dispute.[29]

---

[25] Thus, Albertson's and Bristol Farms lack common management, centralized control of labor relations, and interrelation of operations. Although Bristol Farms is a wholly-owned subsidiary of Albertson's, this alone does not create a single employer relationship.

[26] The grievances would only have an unlawful object if, taking the Unions' factual assertions as true, they would still result in a violation of Section 8(e). Compare Elevator Constructors (Long Elevator), 289 NLRB at 1095.

[27] Teamsters Local 483 (Ida Cal), 289 NLRB 924, 925 (1988).

[28] Hotel & Restaurant Employees Local 274 (Warwick Caterers), 282 NLRB 939, 940-41 (1987).

[29] Ibid. See also Food & Commercial Workers Local 540 (Pilgrim's Pride), 334 NLRB 852, 856-57 (2001) (union did not violate Act by seeking arbitration of arguably

Here, the Unions state that subpoenas returnable before the arbitrator may adduce additional evidence on the single employer issue. In addition, the Unions have stated that if the evidence at arbitration is insufficient to demonstrate single employer status, they would cease pursuing the grievance theory based on Article 1(A)(1). [*FOIA Exemption 5*

.][30] [*FOIA Exemption 5*

.][31]

2. The Unions' Grievances Based on Article 1(A)(2) Do Not Violate Section 8(e) or 8(b)(4).

We also conclude that the Unions' second grievance theory does not unlawfully interpret Article 1(A)(2) to be a de facto hot cargo provision. The Unions' grievances allege that Albertson's transfer to Bristol Farms of two

---

meritorious claim concerning interpretation of union's dues checkoff authorization); Electrical Workers Local 532 (Brink Construction), 291 NLRB 437, 438-39 (1988) (union did not violate 8(b)(1)(B) by instituting and maintaining Section 301 suit seeking to compel employer to submit to contractual grievance arbitration provision even though federal court of appeals ultimately ruled that no labor agreement existed and that the suit lacked merit; Board held union's contention that agreement had automatically renewed was reasonable and raised a bona fide contractual issue).

[30] The Board requires a small quantum of evidence to demonstrate that a suit is reasonably based. See Beverly Health & Rehabilitation Services, 331 NLRB 960, 962 (2000), reconsideration denied 336 NLRB 332 (2001).

[31] [*FOIA Exemption 5*

.]

stores violated Article 1(A)(2), which prohibits all subcontracting of bargaining unit work, because Albertson's was "in essence subcontracting all of the bargaining unit work to Bristol Farms." It is well settled that contract clauses that prohibit subcontracting entirely, or require subcontractors to employ unit employees, have a primary work preservation object and are lawful.[32] Even if the transaction between Albertson's and Bristol Farms may more accurately be characterized as a sale or transfer of stores than as "subcontracting," that is a question the arbitrator will resolve in deciding the merits of the grievance. Indeed, Albertson's has indicated in its written position statement that it is not alleging that the second theory of the Unions' grievances violates the Act. For all these reasons, the Unions' grievance theory based on Article 1(A)(2) does not violate Section 8(b)(4) or 8(e).

3. The Unions' July 7 Rally Outside the Westchester Store Did Not Violate 8(b)(4).

Section 8(b)(4)(ii)(B) proscribes union conduct that coerces, threatens, or restrains persons to cease doing business with a neutral employer.[33] Section 8(b)(4) reflects the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes, and of shielding unoffending employers and others from pressures in controversies not their own."[34] Thus, traditional picketing is meant to cause those approaching the location of the demonstration to take some sympathetic action, such as not entering the facility involved.[35] By directing such

---

[32] See Service & Maintenance Employees' Union Local 399 (Superior Souvenir Book Co.), 148 NLRB 1033, 1034-35, 1047 (1964) ("a contract which prohibits *all* subcontracting, the Board has stated, is not a violation of Section 8(e) but a legitimate device to protect the economic integrity of the bargaining unit") (emphasis in original); Newspaper & Mail Deliverers (Hudson News), 298 NLRB 564, 568 (1990) (no-subcontracting agreement did not violate 8(e)).

[33] NLRB v. Denver Bldg. & Trades Council, 341 U.S. 675, 692 (1951). See also NLRB v. Fruits & Vegetable Packers (Tree Fruits, Inc.), 377 U.S. 58, 68 (1964).

[34] NLRB v. Denver Bldg. & Trades Council, 341 U.S. at 688-689.

[35] Picketing involves a "'mixture of conduct and communication,'" and does not solely depend upon the persuasive force of the idea being conveyed, but rather on

conduct at neutrals, a union can violate Section 8(b)(4)(ii)(B).

There is no question that the Unions have a primary dispute with Albertson's regarding its decision to close the Westchester store and transfer it to Bristol Farms. Thus, the planned store closure and transfer threatened the loss of bargaining unit jobs and, according to the Unions, also violated the collective-bargaining agreement. Further, the picketing did not unlawfully enmesh Bristol Farms in the dispute with Albertson's. Thus, the Unions picketed the Westchester store on a day when it was still being operated by Albertson's. The fact that some of the July 7 picket signs stated "Boycott Bristol Farms" does not require a different conclusion, because Bristol Farms was not conducting business at the Westchester site at the time. Accordingly, the picketing did not intend to restrain or coerce any persons vis a vis Bristol Farms. Therefore, the Region should dismiss the 8(b)(4) charge regarding the picketing, absent withdrawal.

B.J.K.

---

the "conduct element [which] 'often provides the most persuasive deterrent to third persons about to enter a business establishment.'" Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II), 485 U.S. 568, 580 (1988), quoting NLRB v. Retail Store Employees Union Local 1001 (Safeco), 447 U.S. 607, 619 (1980) (Stevens, J., concurring).